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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1201

EMIL TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 7th, 1971

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix:	
Opinion and Judgment of the Court of Appeals	1a

Citations

Coughlan v. United States, 391 F. 2d 371 (9th Cir., 1968)	5
Mastrian v. United States, 377 U.S. 201 (1964)	4
Reinke v. United States, 405 F. 2d 228 (9th Cir., 1968)	5
United States Ex Rel O'Connor v. State of New Jersey, 405 F. 2d 622 (3rd Cir., 1969)	5

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The Petitioner, Emil Tucker, prays that a writ of certiorari issue to review the judgment and opinion entered on December 8, 1970 by the United States Court of Appeals for the Ninth Circuit in the proceeding entitled United States of America, Appellee, v. Emil Tucker, Defendant-Appellant.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8th, 1970. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1. Whether it was proper for the Circuit Court of Appeals to condone the admission into evidence of statements elicited from the Petitioner in the absence of retained counsel under circumstances not indicating a clear and intelligent waiver of counsel.

Statutory Provisions

Title 18, United States Code, Section 2314 provides in part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more knowing the same to have been stolen, converted or taken by fraud;
>
> • • •
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Statement of the Case

The facts which underlie the question herein presented relate to the admission into evidence of statements elicited from the Petitioner, over the objection of counsel, subsequent to Indictment and outside the presence of retained counsel. The trial record indicates that as the result of a conversation with the Petitioner, a Department of Justice attorney by the name of McCulley (R 217) notified an Assistant United States Attorney in Los Angeles that the Petitioner "had some information that would be of help to the Federal authorities in Los Angeles concerning certain

people" (R 216). Subsequently the Petitioner contacted an Assistant United States Attorney in Los Angeles who in response to the Petitioner's inquiries, related that while no promises could be given in return for information divulged (R 218), his cooperation would be brought to the attention of the District Court should he ever be convicted in the case that was pending against him (R 218). Petitioner arrived at the office of the Assistant United States Attorney whom he had spoken to and without meeting the Government Attorney who was apparently not in his office, Petitioner encountered two agents of the Federal Bureau of Investigation. After further assurances by the Assistant United States Attorney who related by telephone that anything the Petitioner said could not hurt him (R221, Petitioner signed a waiver of rights form and proceeded to give a detailed account of his involvement in the transaction which was the subject of this Indictment. (R 229-251) The agents then proceeded to make inquiry about a similar transaction that involved one Dalton Smith, one Louis Greenberg, Coca-Cola stock and Coss and Company in New York (R 248-249). The Petitioner, after refusing to discuss that transaction, was told by the agents for the first time that it was that transaction "that they were interested in" (R 225).

The District Court allowed the admission of statements elicited under these circumstances over objection of trial counsel. The Circuit Court of Appeals affirmed said admission.

Reasons for Granting the Writ

The decision below raises an important problem in the administration of Federal criminal justice. The net result of that decision has been to abridge rights of defendants, rights which the decisions of this Court have sought to protect.

The Decision of the Court of Appeals on the issue of the Admissibility of Petitioner's Statement Is in Conflict with Decisions of the United States Supreme Court.

The Court of Appeals has decided that the Trial Court's admission of the Petitioner's statements into evidence over timely objection by Petitioner's Trial Counsel (R 229) was not reversible error because that Court had examined the circumstances under which said statements were elicited, and has found that his statements were voluntary and, therefore, an intelligent waiver of the Petitioner's Constitutional rights. We respectfully submit that this finding is in error.

Petitioner, Emil Tucker, respectfully requests this Court to review the decision of the Court of Appeals in light of this Court's decision in *Massiah* v. *United States*, 377 U.S. 201 (1964). Although in that case the basic facts differ from the case at bar, the underlying principle of the *Massiah* decision would clearly mandate a similar result in the instant case.

In *Massiah*, this Court made it clear that under prescribed circumstances indicating prosecutorial trickery or deceit, a defendant is denied his rights as guaranteed by the Sixth Amendment where "there was used against him

at his trial evidence of his own incriminating words, which Federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel". Decisions of the various Courts of Appeals have made it clear that statements which may be deemed voluntary in nature may be properly admitted even when taken under these circumstances, i.e. post-indictment and in the absence of counsel. *Reinke* v. *United States*, 405 F. 2d 228 (9th Cir., 1968); *Coughlan* v. *United States*, 391 F. 2d 371 (9th Cir., 1968). However, it is unquestionably clear that only a "clear, explicit, and intelligent waiver may legimate interrogation without counsel following indictment". *United States ex rel O'Connor* v. *State of New Jersey*, 405 F. 2d 632 (3rd Cir., 1969). The question herein presented, therefore, is whether the Petitioner effected an *intelligent* waiver of his Fifth and Sixth Amendment rights.

The Assistant United States Attorney who testified to his conversation in Los Angeles with the Petitioner, by his own admission, related that he informed Petitioner that "anything he told us or any information or help that he gave to us would be passed along to the Court at the time that he appeared before the Court, if that came to pass", and that regarding the prospective interview, *"it certainly couldn't hurt"*. (R 221) (Emphasis mine) It is respectfully submitted that in view of the Assistant United States Attorney's assurances that the interview with the agents of the Federal Bureau of Investigation couldn't affect Petitioner adversely, any subsequent statement elicited must be deemed involuntary in that the prosecutor must be charged with knowledge that indeed any such statement relating to the pending Indictment could, in fact, be used against him. The facts make it abundantly clear that it

was the Petitioner's intention to communicate facts which may have benefited him in the circumstances in which he found himself. Furthermore it is clear that the Petitioner was laboring under the impression that his cooperation concerned a matter outside the scope of the Indictment under which he was charged. The caution and hesitancy with which the Petitioner proceeded with respect to these negotiations is certainly unequal to a clear and knowing waiver of his Constitutional rights.

In conclusion it must be emphasized that this Court is not asked to hold that all post-Indictment statements outside of the presence of a retained attorney are per se violative of a defendant's Sixth Amendment rights. The question herein is whether, under these circumstances, where it appears that the Petitioner gave the statements under a misapprehension as to their import and applicability to the Indictment under which he was charged, the Petitioner may be deemed to have made a clear and knowing waiver of his right to counsel. It is respectfully submitted that the facts do not so indicate.

In order that this Court may remedy the Court of Appeals misapplication of these critical principles of law it is respectfully urged that a review of the judgment below is required.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

JAMES M. LA ROSSA
115 Broadway
New York, New York
Counsel for Petitioner

January 7th, 1971

APPENDIX

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26,063

UNITED STATES OF AMERICA,

Appellee,

vs.

EMIL TUCKER,

Appellant.

[December 8, 1970]

On Appeal from the United States District Court
for the Central District of California

Before:

DUNIWAY and CARTER,

Circuit Judges and

SWEIGERT,

*District Judge.**

PER CURIAM:

The indictment in this case contains two counts charging violations of Title 18 U.S.C. § 2314. Count One charged, in

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* Honorable William T. Sweigert, United States District Judge, Northern District of California, sitting by designation.

substance, that on September 22, 1969, appellant caused to be transported from New York City to Los Angeles, five previously stolen General Motors stock certificates, evidencing 229 shares of common stock, and sixteen previously stolen stock certificates of American Telephone and Telegraph Company, evidencing 170 shares of common stock, of a total value of more than $5,000, knowing the same to have been stolen.

Count Two charged, in substance, that on September 30, 1969, appellant caused to be transported from New York City to Los Angeles, fifty-three previously stolen stock certificates, representing 3,013 shares of common stock in 25 corporations, of a value of more than $5,000, knowing the same to have been stolen.

After court trial without a jury, appellant was found guilty on both counts and sentenced to a term of three years on each count, the terms to be served concurrently.

The evidence was to the effect that the stock certificates transported by appellant between New York and Los Angeles were part of a larger amount of stock stolen in March, 1969, from the Patterson, New Jersey residence of one O'Blenis and that the appellant knew they had been stolen.

IMPROPER USE OF INCRIMINATING STATEMENTS

Appellant, relying mainly on *Massiah* v. *United States*, 377 U.S. 201, contends that during the pendency of this case and in the absence of his attorney the prosecution improperly elicited an incriminating statement from him and thereafter used the statement as evidence against him at the trial.

We have examined the record on this issue and, without reciting the evidence in detail, we merely state that we are of

the opinion that it is to the effect that the interview during which defendant made the statement in question, was sought, not by the government, but deliberately by the defendant, himself; that the statement was made voluntarily, on his own initiative and only after a United States Attorney had expressly inquired whether he desired the presence of his attorney to which inquiry defendant gave his assurance that he had already spoken to his attorney and that the attorney's presence was unnecessary; that defendant was fully informed of his constitutional rights; that there was no overreaching or other unfair tactic on the part of the government; that any right of appellant to have remained silent, or to have had his attorney with him, was clearly waived.

Under these circumstances *Massiah* is inapplicable. See, *Reinke* v. *United States*, 405 F.2d 228 (9th Cir. 1968); *United States* v. *Dowells*, 413 F.2d 801 (9th Cir. 1969); *United States* v. *DeLoy*, 421 F.2d 900 (5th Cir. 1970); *United States* v. *Garcia*, 377 F.2d 321, 324 (2d Cir. 1967).

EVIDENCE OF PRIOR SIMILAR ACT

Appellant next contends that evidence concerning a claimed prior similar act was erroneously introduced at the trial. Appellant concedes that he made neither objection to this evidence nor motion to strike it nor motion for a mistrial.

Again, without detailing the evidence on this issue, we conclude from the record that the evidence discloses a modus operandi similar to the conduct in question at the trial; that it was properly admitted on the issue of the knowledge and intent with which appellant did the acts charged against him and that this evidence was well within the bounds of sound discretion allowed a trial judge in admitting evidence of this

kind. See, *Hernandez* v. *United States*, 370 F.2d 171 (9th Cir. 1966); *Suhl* v. *United States*, 380 F.2d 547 (9th Cir. 1968); *United States* v. *Ovito*, 424 F.2d 276 (9th Cir. 1970); *United States* v. *Klein*, 340 F.2d 547 (2d Cir. 1965).

PROOF OF STOLEN NATURE OF THE CERTIFICATES

Appellant next contends that the government's proof on the issue whether the stock set forth in the indictment had in fact been stolen was hearsay and, as such, improperly introduced over his objection.

This proof came into the record through the testimony of the witness, Bryson, daughter of the elderly owner of the stolen certificates; the witness testified that she had regularly kept a record book of dividends received on the stock owned by her father.

Without detailing her testimony, we conclude that this dividend record book (Ex. 1-A in the record), insofar as it had been regularly kept by the witness and her father, was clearly admissible under the Federal Business Records Act, Title 28 U.S.C. § 1732.

It is true the witness testified that she made additional entries after the burglary to show the certificate numbers of the various stocks; it is also true that this added detail was reconstructed by the witness on the basis of information obtained by her from the transfer agents and treasurers of the various companies.

It is not necessary, however, to decide whether this subsequently added detail was hearsay, as contended by appellant, and as such, incompetent and inadmissible as purported proof of the stolen nature of the stock described in the indictment.

This is so because whatever may be the situation as to Count One, the government's proof of the stolen nature of the stocks described in Count Two of the indictment did not depend entirely upon the above-mentioned record book. (Ex. 1-A).

As to those fifty-three certificates the record shows that the witness, Bryson, examined them (Ex. 5) and clearly established them as the certificates stolen from her father's safe. When appellant objected to the admission of the exhibit on the ground that the witness had actually examined only three of the fifty-three certificates, the court directed her to examine all of them; she did so and testified that none of the endorsements thereon were her father's. Although she did not repeat her earlier testimony about the certificate having been in her father's safe, such was obviously the import of her testimony.

We conclude that the proof was clearly competent and sufficient as to Count Two.

Since the defendant, who was found guilty on both counts of the indictment was sentenced to 3 years on each count, these sentences to run concurrently, there is no need for determining whether there is any evidentiary defect with respect to the certificates described in Count One. This procedure has been previously followed by this court. See, *United States* v. *Parker*, F.2d (9th Cir. Oct. 15, 1970); *McCullough* v. *United States*, 403 F.2d 1013 (9th Cir. 1968); *Pasterchik* v. *United States*, 400 F.2d 686 (9th Cir. 1968); *Chavez* v. *United States*, 387 F.2d 937 (9th Cir. 1967).

The judgment is therefore affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1201

EMIL TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1970. The petition for a writ of certiorari was filed on January 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly admitted into evidence statements made by petitioner.

415-888—71

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California petitioner was convicted of two counts of interstate transportation of stolen securities in violation of 18 U.S.C. 2314,[1] and sentenced to concurrent terms of three years on each count. The court of appeals affirmed (Pet. App.).

1. The evidence showed that on the evening of March 16, 1961, the residence of John H. O'Blenis and his daughter, Mrs. Barbara Bryson was burglarized. Among the items stolen were securities of an approximate value of $450,000.00 (Tr. 9, 10, 11). On September 22, 1970, the securities appeared at the Los Angeles, California, brokerage firm of E. F. Hutton and Company (Tr. 39). One Wilson, a regular customer of the brokerage firm, was contacted by a C. W. Deaton, who related that an attorney in New York was attempting to sell his deceased brother's securities privately in an effort to avoid New York State inheritance tax (Tr. 99). On September 22, Wilson met with petitioner and drove to the brokerage firm where $26,000 in securities were sold. Wilson kept 15% of the proceeds as his commission (Tr. 102, 104). Deaton and one George Bell were to receive a percentage of Wilson's payment as a finder's fee or commission (Tr. 188). After this "test run", another transaction was set for a week later (Tr. 108). Wilson met with petitioner and went to the brokerage firm where petitioner

[1] We are lodging with the Clerk the transcript of trial (Tr.).

turned over securities to Wilson for sale (Tr. 110). The sale was not consummated that day. That evening, Marc Frederic, Wilson's broker with E. F. Hutton, telephoned Wilson and informed him that "something was bothering him about the stock" (Tr. 111).

The next morning at E. F. Hutton, Wilson learned that the securities had been stolen (Tr. 115). He informed petitioner that the FBI had been called (Tr. 115). Petitioner said that he felt a mistake had been made (Tr. 115). Later that evening petitioner asked Wilson to retrieve the securities from E. F. Hutton and Company. Wilson replied this was not possible as the FBI had been called in (Tr. 119). The next day, petitioner returned to New York under the name of E. Tippett (Tr. 247).

In a statement to FBI agents (discussed below) petitioner said that one Dalton Smith had contacted him and had asked him to sell some stock belonging to a friend. Smith wanted petitioner to conduct the sale so that the paying of inheritance tax could be avoided (Tr. 229). He indicated that an associate of his, one Jesse White would contact petitioner later to conclude the arrangements (Tr. 230). Subsequently, petitioner met with White and received a list of the securities purporting to be of total value of about $300,000.00 (Tr. 230). The status of the securities was "checked out" by a friend of petitioner, who told him that the stocks were all right (Tr. 233–234). Petitioner related that he had been in contact with C. W. Deaton, who said that he had a buyer in California, namely, Wilson (Tr. 234–235). Petitioner subsequent-

ly told White in New York that he had a buyer (Wilson) in California who wanted a 15% commission, and that White, Smith and petitioner should get 25%, with the remainder to go to the principals (Tr. 236). He then related that he flew to Los Angeles, met with Wilson and completed the first transaction at the E. F. Hutton brokerage company (Tr. 237–238). Petitioner related the events leading up to the second transaction which, petitioner explained, was not completed because it was revealed that the securities had been stolen and that the FBI had entered upon an investigation (Tr. 239–248).

2. The issue raised by petitioner concerns the admissibility of his statements to the agents. The judge heard testimony on this issue before admitting the statements into evidence. The following facts were established:

Petitioner was indicted on the instant charges in October 1969. He had retained counsel when he pleaded not guilty in November 1969, and was released on bail. On December 15, 1969, David Nissen, an Assistant United States Attorney in charge of the investigation of organized crime in Los Angeles, received a call from a government attorney in Miami to the effect that petitioner had offered to supply information about some people in the Los Angeles area. One name mentioned was Dalton Smith, in whom Mr. Nissen was interested (Tr. 211–217). When petitioner telephoned Mr. Nissen a few days later he referred to the Los Angeles indictment, but Mr. Nissen made clear that he knew nothing about the case (Tr. 218).

Mr. Nissen told petitioner that he could give him no assurance that his cooperation would be to any advantage to him, particularly with respect to his case (Tr. 218). Mr. Nissen said that if petitioner cooperated, the fact would be brought to the attention of the court should petitioner be convicted (Tr. 218). Mr. Nissen suggested that petitioner should bring counsel with him, but petitioner said that he had spoken with his counsel and that this was not necessary (Tr. 218; see Tr. 219–220).

On December 22, when petitioner was talking with two FBI agents, he again talked briefly with Mr. Nissen by telephone. He again asked what benefit he would derive, and was again informed that any help furnished would be brought to the attention of the court if petitioner was convicted. Upon petitioner's query whether that would be of benefit to him, Mr. Nissen replied, "[W]ell, it certainly couldn't hurt" (Tr. 221). Before talking with the FBI agents on December 22, petitioner signed a waiver of rights form.

After petitioner made the statement summarized above, the FBI agents asked him whether he had any transactions with Dalton Smith and Louis Greenberg in relation to Coca-Cola stock sold through a brokerage firm in New York, Coss & Company (Tr. 249). Petitioner said that he knew about such a transaction but he was involved only in the collection of money (Tr. 249). On January 12, 1970, petitioner again called Mr. Nissen and indicated that he wanted to "finish the interview" (Tr. 222). He met with Mr. Nissen and two agents of the FBI on January 16, 1970, at Mr.

Nissen's office (Tr. 223). Petitioner indicated that before he signed a waiver of rights form he wanted to "get a few things straight" (Tr. 223). He wanted "some promise or some assurance of what you are going to do for me" (Tr. 224). Again, Mr. Nissen indicated the government's policy that if he cooperated, such "cooperation would be made known to the court" (Tr. 224). Petitioner stated that that was not adequate. He was informed that "[T]hat is all we can and will do for you. If that is not adequate, you can leave" (Tr 224). Petitioner remained for approximately an hour thereafter, attempting to secure further assurances, When they were not forthcoming, he departed (Tr. 225).

On January 20, 1970, petitioner telephoned Mr. Nissen and indicated that he was prepared to cooperate, but that again he wished an assurance (Tr. 226). Mr. Nissen again reiterated the government's policy. An appointment was made for the 26th of January but was not kept by petitioner (Tr. 226).

ARGUMENT

The evidence presented shows that petitioner initiated confrontations with the agents freely and voluntarily after consultation with his attorney. Petitioner made his statement after being fully advised as to his constitutional rights and after signing a waiver of those rights. Petitioner's repeated attempts to secure benefits for his cooperation clearly establish the motivation for his action. Since petitioner was warned of his right to the presence of counsel and was aware

that he was talking to a government agent, the decision in *Massiah* v. *United States*, 377 U.S. 201, is inapplicable.

Petitioner argues that his statement was involuntary because of a statement made to him before the FBI interview by Assistant United States Attorney Nissen. Nissen testified that he reiterated to petitioner that, if he cooperated, that fact would be called to the attention of the court if petitioner was convicted. Petitioner then asked whether that would be of benefit to him and Mr. Nissen replied, "[W]ell, it certainly couldn't hurt" (Tr. 221). It is evident, in context, that Nissen's remark referred only to the fact that the report to the court (if petitioner were convicted) "couldn't hurt".

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1971.

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